United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
JOHN F. DAVIDSON

75-7608

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

IRVING SANDERS, *Plaintiff-Appellee,*

—against—

LEON LEVY, *et al., Defendants-Appellants.*

EGON TAUSSIG, *Plaintiff-Appellee,*

—against—

SIDNEY M. ROBBINS, *et al., Defendants-Appellants.*

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees,*

—against—

ERIC HAUSER, *et al., Defendants-Appellants.*

REPLY BRIEF OF DEFENDANTS-APPELLANTS EDMUND T. DELANEY AND EMANUEL CELLER

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PRELIMINARY STATEMENT

This Reply Brief of the Unaffiliated Defendants will be limited

(1) to replying to the contention in POINT I of the Brief of Plaintiffs-Appellees ("Plaintiffs' Brief") that the determination of the District Court that the defendant Fund, rather than plaintiffs, should bear the cost of culling out from the Fund's records the names and addresses of members of the class to whom notice is required to be sent by Fed. R. Civ. P. 23(c)(2) was not appealable as of right under the collateral order doctrine; and

(2) to replying to the contention in POINT III of Plaintiffs' Brief that the District Court did not commit reversible error in making such determination.

The Unaffiliated Defendants adopt the arguments set forth in the Reply Briefs on behalf of the appellants Oppenheimer Fund, Inc. and Oppenheimer Defendants in reply to the contention in POINT II of Plaintiffs' Brief that the District Court did not commit reversible error in determining that this consolidated action may be maintained as a class action under Rule 23(b)(3).

POINT I

THE DISTRICT COURT'S DETERMINATION THAT THE DEFENDANT FUND SHOULD PAY THE COST OF IDENTIFYING THE MEMBERS OF THE CLASS IS CLEARLY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE AND THE DECISION OF THE SUPREME COURT IN EISEN IV.

Whatever doubts may have arisen as to the wisdom of this Court's continuing to hold that District Court determinations

"simply granting or denying class action status" are appealable as final orders under 28 U.S.C. §1291 by reason of the "collateral order" and "death knell" doctrines (see concurring opinions of Friendly, Circuit Judge, in Parkinson v. April Industries, Inc., 520 F.2d 650 (2d Cir., 1975) at pages 658-660, and in Korn v. Franchard, 443 F.2d 1301 (2d Cir. 1971) at page 1307; cf. Hackett v. General Host Corporation, 455 F.2d 618 (3d Cir. 1972)), it remains crystal clear that the determination of the District Court requiring the defendant Fund to pay a major portion of the cost of the notice to members of the class required by Rule 23(c)(2)is appealable under §1291. The opinion of Judge Friendly referred to above, expressly distinguished, at page 658, "a class action designation order, like that in Eisen... which also contains provisions requiring defendants to pay money or to take other action not remediable on a review of the final judgment..." (underscoring supplied).

For this reason, it is not necessary, on this appeal, for this Court again to consider the difficult question as to the appealability of an order which does no more than grant or deny class action status.

The opinion of the Supreme Court in Eisen IV provides all the authority that is required for a determination of this appeal. In that case the District Court's determination imposed the major portion (90%) of the cost of the Rule 23 notice on respondents, Carlisle & Jacquelin. Similarly, in the instant

case the District Court's determination imposed the major portion (about 75% - about $16,000 out of total notice costs of about $21,000) on the defendant Fund. Here, as there, (and as in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545) the determination "involved a collateral matter unrelated to the merits" of plaintiff's claims. Like the order in both of those cases the District Court's determination "on the allocation of notice costs was 'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it' and it was similarly appealable as a 'final decision' under §1291". Eisen IV, 417 U.S. 156 (1974), 94 S.Ct. 2140, at page 2150.

Similarly, it is submitted, this court has jurisdiction "to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% [here, about 75%] of the notice cost to respondents [here, the defendant Fund] was but one aspect of its effort to construe the requirements of Rule 23(c)(2) in a way that would permit petitioner's [here, plaintiffs'] suit to proceed as a class action". Eisen IV, supra, at 94 S.Ct. 2150.

Since, as set forth in the above-quoted statements of the Supreme Court, the allocation of notice costs is "but one aspect" of the District Courts' effort to permit the suit" to proceed as a class action", and since this court has jurisdiction to review the District Court's allocation of notice

costs, it follows that this court has pendent jurisdiction on this appeal to review the District Court's determination that the action may proceed as a class action (see General Motors Corporation v. City of New York, 501 F.2d 639, 648 (2d Cir. 1974); Deckert v. Independent Shares Corp., 311 U.S. 282, 287 (1940)) regardless of the question as to whether or not this court would have had jurisdiction to review such determination if it contained no "provisions requiring defendants to pay money or take other action not remediable on a review of the final judgment." Parkinson, at page 658.

As stated in Chief Judge Kaufman's opinion in General Motors, at page 648:

> "The guiding principle to inform the discretionary application of pendent jurisdiction is whether review of the appealable order will involve consideration of factors relevant to the otherwise non-appealable order."

In that case the court held that no such overlap existed between the District Court's order granting class action status and its order denying disqualification of counsel for one of the defendants. In the instant case, however, as set forth in the portion of the Supreme Court's opinion in Eisen IV quoted above, the District Court's allocation of notice costs "was but one aspect" of its determination granting class action status.

For this reason the District Court's class action determination, as well as its determination requiring the defendant Fund to pay a major portion of the cost of notice, is clearly appealable.

POINT II

THE DISTRICT COURT'S DETERMINATION THAT THE DEFENDANT FUND SHOULD PAY THE COST OF IDENTIFYING THE MEMBERS OF THE CLASS IS IN ERROR AND SHOULD BE REVERSED

Plaintiffs argue that it was a reasonable exercise of discretion for the Court to impose the cost of identifying the members of the class on the Fund, which was one of the defendants who made it necessary to incur this cost (Plaintiffs' Brief, page 55).

Plaintiffs' argument is based on the following two premises, each of which is incorrect.

1. Plaintiffs assert that they "proposed a valid class consisting of all persons who purchased shares of the Fund during the class period who were still shareholders of the Fund" (Plaintiffs' Brief, page 50), but the District Court granted the defendants' request "to have the class more broadly defined so as to include persons who were no longer shareholders of the Fund (which would make it necessary to ascertain the names and addresses of the class members in order to give notice to all members of the class)" (Plaintiffs' Brief, pages 55-59).

In fact, it was the plaintiffs - not the defendants - who requested that the class be defined to include all persons who purchased shares of the Fund during the specified period, without excluding persons who subsequently sold their shares. Plaintiffs' motion for an order pursuant to Fed. R. Civ. P. 23(c)(1) declaring that this consolidated action be maintained as

a class action (Appendix, A-118, 119) expressly requested that the class consist of "the persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970" (Appendix, A-128). It was not until after plaintiffs came to the conclusion that the cost of giving all the members of that class the notice required by Rule 23(c)(2) would be more than they wished to pay that plaintiffs changed their position and proposed to eliminate members of the class who were no longer shareholders of the Fund. The defendants opposed plaintiffs' attempt to change their position and the District Court found plaintiffs' proposal to be arbitrary and improper.

2. Plaintiffs assert that such determination by the District Court increased "the cost involved in giving notice". (Plaintiffs' Brief, page 55) In fact, there is no proof that such determination substantially increased the costs of giving notice and it appears likely that the cost of identifying the members of the class would have been substantially the same, regardless of whether the class included or excluded persons who are no longer shareholders of the Fund.

Defendants maintain that even if plaintiffs' premises were valid, their conclusion would not necessarily follow, in light of Eisen IV which mandates imposing the cost of notice (of which the cost of identifying members of the class is a part) on plaintiffs. However, since both of plaintiffs' premises are invalid, there is no basis whatsoever for imposing any part of the cost of notice on any defendant.

As noted above, it was the plaintiffs - not the defendants - who requested that the class consist of "the persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970" (Appendix, A-128). This was consistent with the express representations which all three plaintiffs had made in their complaints (served, respectively, in March, April and May, 1969) to the effect that each plaintiff brought his action "representatively on behalf of himself and all other persons similarly situated who purchased shares of Oppenheimer Fund, Inc. subsequent to March 15, 1968" (Appendix, A-11, A-34 and A-43). Plaintiffs thereby represented and have continued to represent to all persons who purchased shares of the Fund during the specified period that plaintiffs were acting on behalf of all of them, not merely such of them as continued to be shareholders of the Fund.

Furthermore, by memorandum and order of District Judge Thomas S. Croake filed December 17, 1969, consolidating for all purposes the actions of the three plaintiffs (Appendix, Index to the Record, A-2), all persons who had purchased shares of the Fund were expressly enjoined from prosecuting any other or further actions seeking the same or similar relief in respect to the transactions referred to in the complaints in all three actions. (Appendix, A-120, 121, affidavit of Donald N. Ruby, sworn to March 30, 1973, paragraph 4). Shareholders who subsequently sold their shares were in no way excepted or excluded from the injunctive provisions of the order. There is no way of telling whether or how many of these shareholders might have

instituted an action if they had not believed that they were being fairly and adequately protected by the plaintiffs or that they were enjoined from bringing action on their own behalf by the order of the Court.

Plaintiffs and their counsel cannot in good conscience seek the benefits of Rule 23 as purported protectors of the shareholders of the Fund and then, after the consolidated cases had been pending for 4-1/2 (now 7) years, change their position and seek to eliminate from the class over 18,000 shareholders who sold their shares (the "Former Shareholders"), but still "can be identified through reasonable effort", merely because the plaintiffs are not willing to pay the cost of giving them the individual notice required under Rule 23 of the Federal Rules of Civil Procedure.

The District Court was clearly right in rejecting plaintiffs' belated attempt to eliminate the Former Shareholders from the class. See Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971) where, with reference to a motion by plaintiff, made more than two years after the complaint was filed, for an order determining that the action should not be maintained as a class action, the opinion of District Judge Marvin E. Frankel stated, at page 496:

> "In a word, having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender. It is necessary at least that some decent notice be given to those plaintiffs purported to represent so that such

> members of what was once said to be a 'class' may appear, if they wish, to oppose the present application, seek to be substituted as representatives or take other steps appropriate for protection of their interests."

As stated by District Judge Walter R. Mansfield in Guttman v. Braemer, 51 F.R.D. 537 (S.D.N.Y. 1970) at page 540:

> "When a plaintiff seeks to represent a class he becomes a fiduciary with respect to all of its members. He cannot barter away the rights of some in exchange for the right to represent others." (emphasis in original)

We also note that there is precedent for holding that plaintiffs' actions would have constituted the practical equivalent of a voluntary dismissal of the action as to the Former Shareholders, requiring that they be given notice of their threatened elimination from the class and of their right to seek intervention. In a number of cases, a plaintiff's failure to prosecute a class action has been equated with a voluntary dismissal, requiring that notice be given to the members of the class before an action is dismissed for want of prosecution. See Webster Eisenlohr v. Kalodner, 145 F.2d 316, 320 (3d Cir. 1944) cert. denied 325 U.S. 867 (194[illegible]; Marcus v. Textile Banking Co., 38 F.R.D. 185 (S.D.N.Y. 1965); Malcolm v. Cities Service Co., 2 F.R.D. 401, 407 (D.Del. 1942); 5 Moore's Federal Practice, Second Ed., ¶41.11(2) at 1116n.5; Haudek, Settlement and Dismissal of Stockholders' Actions, 22 Southwestern Law Journal 767, at pages 776 et seq. (Dec. 1968).

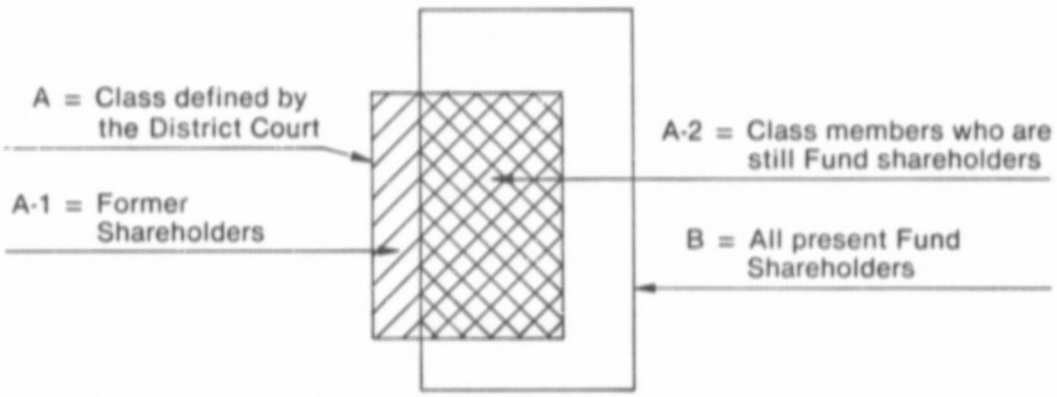
None of the defendants in the instant case initiated any steps whatever to have the class defined more broadly than plaintiffs themselves had represented it to be in their complaints,

or than plaintiffs had requested the court to define it in their class action motion dated March 30, 1973 (Appendix, pages A-116-119, A-128). Plaintiffs themselves did not propose that members of the class who were no longer shareholders of the Fund be eliminated from the class until almost nine months later (Affidavit of Donald M. Ruby, Sworn to December 12, 1973, Appendix, A-142-144, A-150), after they had concluded that the cost of giving them the notice required by Fed. R. Civ. P. 23(c)(2) was more than they wished to pay. As stated in paragraph 7 of Mr. Ruby's affidavit (Appendix, A-147):

> "Plaintiffs herein are not seeking by virtue of the procedure proposed by us to depart from the rules set forth in Eisen ... but rather are requesting the Court to direct that notice be given in a manner consistent with the provisions of Rule 23 and the requirements of due process, which they will be able to afford". (underscoring supplied)

But as stated by the Supreme Court of the United States in Eisen IV (417 U.S. 156, at page 177): "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs."

Moreover, plaintiffs have completely failed to demonstrate that their proposed reduction in the size of the class would have materially affected the cost of giving notice. In this connection, it may be helpful to depict graphically the groups of shareholders as they would exist under the alternative proposals made by plaintiffs, as set forth below:



It is apparent that whether the class includes only those shareholders who are in Group A-2, as plaintiffs propose, or all shareholders included in both Groups A-1 and A-2, as the District Court found to be required, it will be necessary to create a series of special new computer programs in order to ascertain the names and addresses of class members so that "individual notice to all members who can be identified through reasonable effort" may be given, as required by Rule 23(c)(2). Thus, it does not appear that defendants' opposition to the improper bifurcation of the class attempted by plaintiffs will occasion any substantial increase in costs resulting from the necessity of creating new computer programs to cull out the names of class members. A number of new programs will have to be devised in either event and the evidence does not make it clear

that the costs will differ substantially. (See Deposition of Investment Company Service Corporation and Additional Information Supplementing the Same, Appendix, A-195, et seq.) This is an added reason why it was not a reasonable exercise of discretion for the District Court to impose the cost of such new programs on the defendants.

The opinion of the District Court held that, as pointed out by defendants, "plaintiffs' proposal would involve an arbitrary reduction in the class (Appendix, A-175) and "would cut out of the class approximately 18,000 persons who logically belong in the class" (Appendix A-178) because "If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares" (Appendix, A-175).

Since, as properly held by the District Court, it would have been arbitrary, illogical, and unfair to eliminate the Former Shareholders from the class, and since, as shown above, the evidence does not, in any event, establish that such elimination would substantially reduce the cost of culling out the names of class members, it is submitted that it was illogical and unfair, as well as contrary to the law as established by Eisen II and Eisen IV, for the District Court to impose the cost of culling

out the names and addresses of members of the class upon the Fund because of the fact that it was one of the defendants who persuaded the District Court that it would be improper to eliminate the Former Shareholders from the Class.

CONCLUSION

The District Court's determination that the defendant Fund should pay the cost of identifying the members of the class is appealable, is in error and should be reversed.

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Judith Fatony, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 626 Armstrong Avenue, Staten Island, New York 10308. That on the 15th day of March, 1976 deponent served the within Reply Brief upon Wolf Popper Ross Wolf & Jones, attorneys for Plaintiffs - Appellees in this action, at 845 Third Avenue, New York, New York 10022, upon Guggenheim & Untermyer, attorneys for Oppenheimer Defendants - Appellants at 80 Pine Street, New York, New York 10005 and upon Weisman, Celler, Spett, Modlin & Wertheimer, attorneys for Oppenheimer Fund, Inc. at 425 Park Avenue, New York, New York 10022, the addresses designated by said attorneys for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Judith Fatony

Sworn to before me this
15th day of March, 1976.

Paul L. Menger

PAUL L. MENGER, Notary Public, State of New York
No. 30 [illegible], Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1978